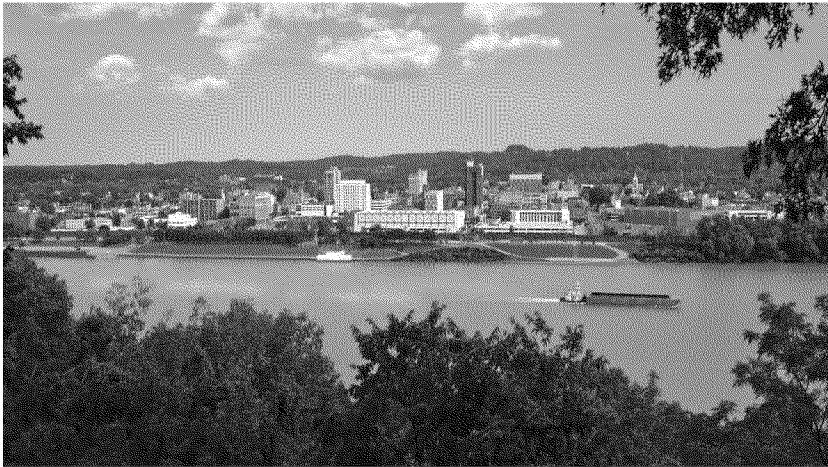


Key terms used in the 2015 WOTUS rule were vague such as: "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring". But they are also important in defining what waters are jurisdictional. These terms are either broadly defined, or not defined at all which has led to further confusion, not less, over what waters fall within federal jurisdiction. Local governments need a rule that puts forward clear definitions and provides examples and graphics for further clarity. Without this clarity, it could lead to further unpredictability and result in unnecessary project delays, subjective judgements and inconsistency across the country.



Ohio River, City of Huntington, West Virginia
Photo Source: Huntington Quarterly

D. Flexibility and Regionalization

In formulating a revised 'Waters of the U.S.' rule it should have flexibility and reflect natural and regional variability of our nation's waters. As a basic approach, criteria could be established that recognize natural ecoregions (delineated on the basis of natural and anthropogenic factors) to recognize geographic variability

"In the West, water quantity is a challenge, but quality is equally important. Protecting watershed health of the eastern Sierra is crucial to northern Nevada local communities."

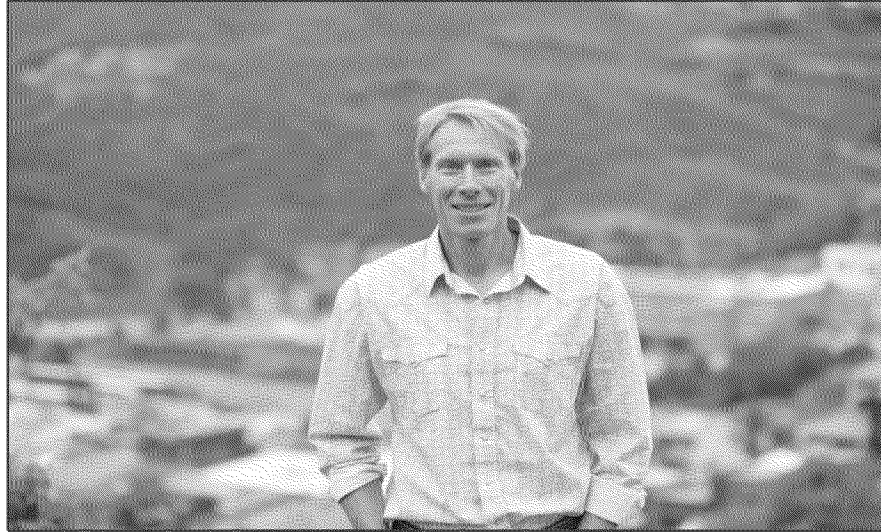
***Council Member David Bobzien,
Reno, NV***



Council Member David Bobzien, Reno, NV

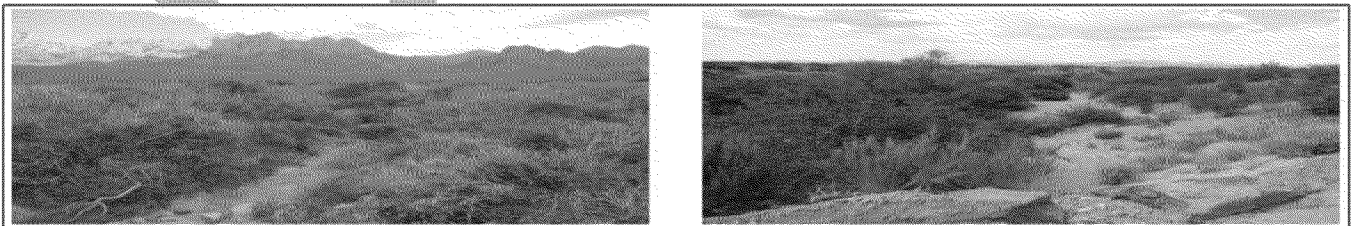
“Park City is a small western community of 8,000 with big water challenges. We work closely with our EPA Region 8 office to help solve our water issues. The EPA is not just a regulatory agency, but is an essential resource to help us address our legacy mining issues and its environmental impacts.” Council Member Andy Beerman, Park City, UT

among regions. States and tribes should have further input in this process to modify or improve on this basic approach. Workgroups made up of federal, state and local officials could help establish local delineation factors characteristic of these regional water bodies such as western ephemeral streams, and other regional unique wetlands such as pocosins, Carolina bays etc.



Council Member Andy Beerman, Park City, UT

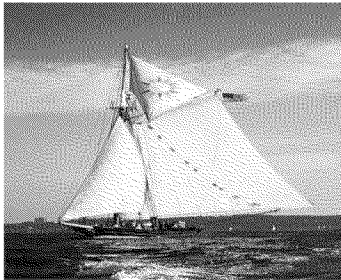
Western arid streams may need further regional determinations as to whether these areas are otherwise dry channels characterized by irregular (not seasonal) ephemeral flows or may actually qualify as ‘Waters of the United States.’ These jurisdictional calls of WOTUS should be the exception rather than the rule. Also, wetlands and streams in the State of Florida also should be considered in separate regional guidance since most of the State could be classified as ‘Waters of the U.S.’ due to high groundwater tables and surface connections with ‘Waters of the U.S.’



“Arroyos are common geographic water features in the arid west. The examples in these photographs are non-permanent, ephemeral waters that only carry water during extreme precipitation events. This is an example of land structures which cause confusion under a one size fits all approach.” Image Credit: Dripping Springs Road and Baylor Canyon Road Improvement Project Environmental Assessment, BLM & FHWA, April 2015.

E. Enhanced State and Local Government Role

States play a vital role in the protection of wetlands by addressing waters and activities that *are not* regulated under the Section 404 program, or by imposing additional limits on activities that *are* regulated under that program. Pursuant to Section 404(g) of the Clean Water Act, a state can *assume* the authority to issue permits for the discharge of dredged or fill material into waters regulated under the Clean Water Act *other than traditional navigable waters or waters seaward of the high water mark*. (33 U.S.C. § 1344(g)).



Clearwater

"Since the passage of the Clean Water Act in 1972, tremendous progress has been made cleaning up America's waterways. Water crises in Flint, MI, Newburgh and Hoosick Falls, New York, remind us: The Clean Water Act is as important today, as it was then. It needs to be clarified, strengthened and enforced. All waters are connected to the water we drink. It's important to the economy, and it's important to each of us". Legislator Manna Jo Greene, Ulster County, NY



Legislator Manna Jo Greene, Ulster County, NY

EPA's regulations also authorize tribes to assume Section 404 permitting authority within their jurisdiction (40 C.F.R. § 233.2). In order to assume the Section 404 permitting program, a state must enact laws and regulations to create a program that meets requirements designed to ensure that the state can administer the Section 404 permitting program as the Corps.

This process could be streamlined and could be incentivized for state assumption. States can play a greater role in the administration of the federal program and streamline permitting for developers in the state through the issuance of State Programmatic General Permits. CWA Section 404(e) authorizes the Corps of Engineers to issue general permits "on a state, regional or



Back Cove runner, Portland ME. Photo Source: Corey Templeton Photography

nationwide basis for any category of activities involving discharges of dredged or fill material", if there are only minimal adverse environmental effects.

Local regulation of wetlands in addition to the state and federal programs have many benefits as well. Local decision makers have numerous land use tools available to them that can be more effective at less cost. They can also protect sensitive landscapes valuable to their community, such as with building permits, zoning authority, sanitary and health codes, and soil erosion control.

F. Scalia Approach: Challenges and Opportunities

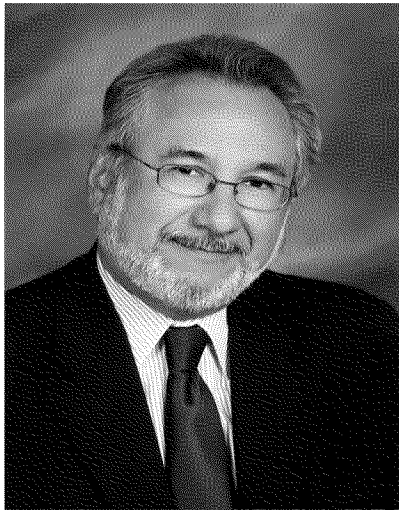
Local governments, in general, support a narrow interpretation of the Clean Water jurisdiction. The Scalia opinion applies a narrow interpretation to CWA jurisdiction. Such an interpretation would extend jurisdiction to only "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. The LGAC puts forth an approach that would yield categorical answers of jurisdiction of 'yes', 'no' or 'maybe' using criteria such as contained within the 2008 guidance and consistent with the Scalia approach.



"Certainly America's waters must be protected. We should not sacrifice the quality of our streams. However, pragmatism must also be reflected in our regulations. A pristine stream in a desert of economic activity creates an unnecessary tension between the intent to protect our environment and those who simply seek an honorable way to provide for their families. We must always be prepared to balance the scales between environmental protection and economic opportunity." Mayor Stephen Williams, Huntington, WV

Mayor Stephen Williams, Huntington, WV

Local governments are also concerned about the assurances that water resources which provide (or potentially provide) our communities' drinking water (source water) are regulated and protected. These significant water bodies form the assets of our water infrastructure and these areas may or may not fall within the Scalia interpretation as "connected to a federal navigable waterway." Local governments would support States and Tribes assisting to identify these significant water bodies by delineating and mapping these significant 'Waters of the State'. These areas once identified should have primacy in decision-making.



Dr. Hector Gonzalez, M.D.

"We need to protect our streams and wetlands that are the water source for many of our communities, especially for our EJ communities now and for our future generations. And we need to engage EJ communities to look at local solutions."

*Dr. Hector Gonzalez, M.D., Director
City of Laredo Health Department, TX*

G. Exemptions

Exemptions for stormwater and green infrastructure are important for local government. Local governments would be supportive of a revised rule that would retain codification of the waste treatment exemption. It should also extend to municipal separate storm sewer systems (MS4s), stormwater ponds,

"Ensuring clean water is equally important for all Americans. Here in Michigan, we know this story far too well because of the Flint Water Crisis and continuing conversations about how we can ensure access to quality drinking water. The WOTUS rule must be carefully vetted to ensure that each level of government has the tools, resources, and clarity it needs to ensure clean water."

State Representative Stephanie Chang, Michigan



State Representative Stephanie Chang, Michigan

settling basins and recycled water facilities which depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. There has also been a major concern of county governments that roadside ditches are also exempt.

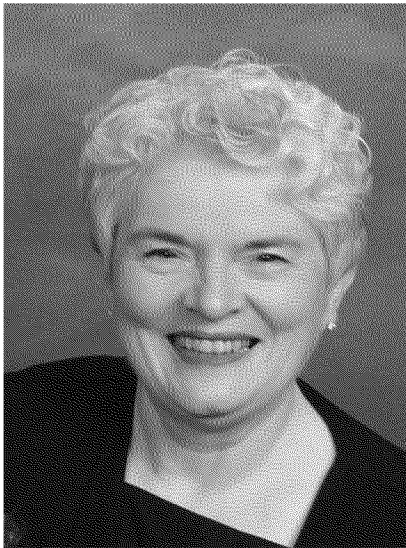
“The EPA Local Government Advisory Committee is key to supporting and building the local-federal partnership. The local officials that serve on the LGAC are able to directly share feedback with EPA on rules and regulations and to help shape them to best meet the needs of communities across the country.” Carolyn Berndt, National League Of Cities

artificially created wetlands, recycled water reservoirs and other features associated with water recycling.⁵

The revised rule should affirm that reservoirs and ponds along with influent and treated effluent storage ponds are within the scope of the waste treatment exemption, consistent with the regulatory definition of “complete waste treatment system” found in existing federal regulations. This would include features such as storage ponds, basins,

H. Permitting Reform

CWA Section 404 permitting is complex and outdated. Agencies’ budgets and staffing are overwhelmed and lack resources to respond to individual permits. At the same time, the private sector confronts time-consuming requirements that pose significant delays and economic burdens.



“It’s not just about getting a permit done quickly. It’s about ‘why’ you have the permit in the first place. As long as we keep in mind that it’s about our environment, and it’s about our water, we can implement that in any way we choose.”

Commissioner Victoria Reinhardt, Ramsey County, MN.

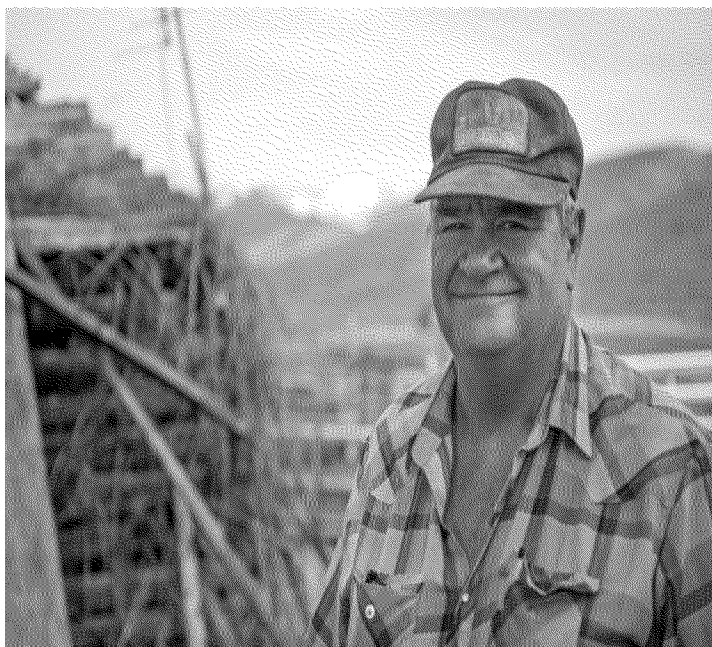
**Commissioner Victoria Reinhardt,
Ramsey County, MN**

⁵ 1 See 40 C.F.R. §35.2005(b)(12), defining “complete waste treatment system” as “all the treatment works necessary to meet the requirements of title III of the [CWA], involving . . . the ultimate disposal, including recycling or reuse, or from the treatment process.”

Permitting can be made more efficient and more effective. For example, permitting can be done more efficiently and in less time (less than 90 days). It can also be more flexible, decentralized and integrated with community goals. Local governments would be generally in favor of the State Assumption of the 404 program. Also, further consideration of General Permits and mapping would aid in permitting reform.

I. Agriculture and Rural Communities

Agriculture and rural communities have expressed concerns about the 'Waters of the U.S'. Most of the concern of the 2015 rule has been whether it would modify existing statutory provisions that exempt "normal farming and ranching" practices from dredge and fill permitting or others that exclude certain agricultural discharges, such as irrigation return flow and stormwater runoff, from all CWA permitting. The other key area of concern was the confusion whether or not ditches were exempt.



"The Small Community Advisory Subcommittee (SCAS) received many great comments from across the nation, particularly as the issue applies to agriculture and small communities. We have done our best to incorporate them into our recommendations, and hope we can help to formulate a clean water rule that can work across the nation."

*Commissioner Dr. Robert Cope, DVM
Salmon, ID, Chair of Small Community Advisory
Subcommittee
SCAS Chairman*

**Commissioner Dr. Robert Cope, DVM, Salmon, ID,
Chair of the Small Community Advisory Subcommittee (SCAS)**

Normal agricultural and silvicultural practices are exempt but the interpretive rule issued in 2014 (later rescinded) to clarify the 56 practices that are exempt from CWA Section 404 permitting was very confusing to the agricultural community. Another issue for rural communities is the National Pollutant Discharge and Elimination System (NPDES) permitting for application of pesticides and herbicides in WOTUS. Also, there is a concern that 'prior converted croplands' which are exempt if they are certified by NRCS, it should also be exempt from wetland regulations administered by the Army Corps of Engineers and EPA (Section 404 of the Clean Water Act).

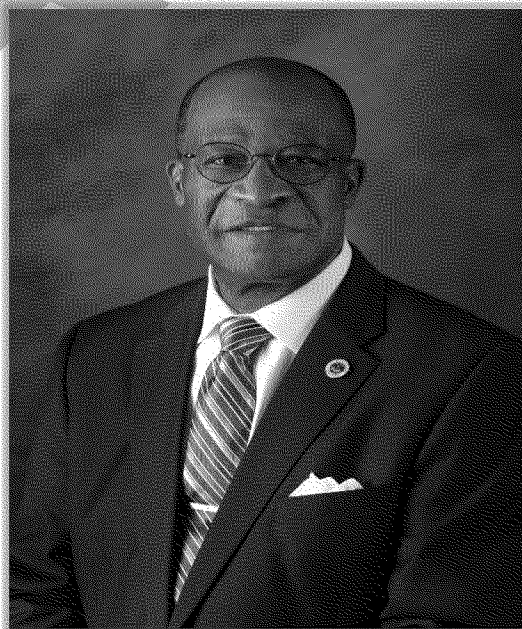


Fencing Livestock, Lexington, KY-Photo Source, Eric Vance, EPA

However, if the land changes to a non-agricultural use, or is abandoned, according to the criteria established by the Corps and EPA, it may be regulated under the CWA. These issues combined with the complexity of the WOTUS and the role of the NRCS poses significant issues for the agricultural sector and rural communities.

"'Waters of the United States' give us the unique opportunity to make sure all Americans have access to the best drinking water possible. We also have a duty to preserve the most vital part of life- Water."

*Mayor (Former) Johnny DuPree, Ph. D.
Hattiesburg, MS*



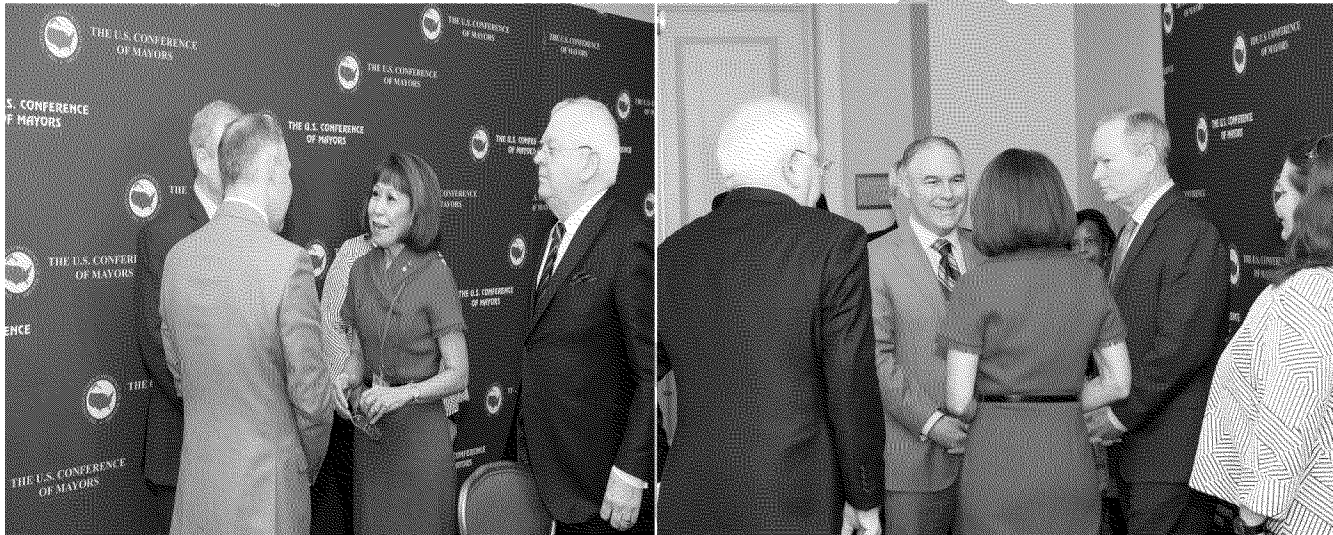
Mayor (Former) Johnny DuPree, Ph.D., Hattiesburg,

Vice-Chair, Small Community Advisory Sub-Committee

MS

J. Outreach to Local Governments

There is a need for enhanced outreach to local governments. Its significance in WOTUS decision-making is all the more critical. A comprehensive communication strategy is needed for local governments that improves the channels of information distribution, and enhances explicit communication at all levels of government. Getting information into the hands of local governments where it will have the most impact must be a priority. This is particularly relevant in small, disadvantaged and ethnically diverse communities. Local governments need to act effectively so that information will reach all relevant parties so it can also be readily communicated effectively to citizens.



Administrator Pruitt meets with Mayor Elizabeth Kautz, Burnsville, MN and Vice-Chair, Protecting America's Waters Workgroup-at the U.S. Conference of Mayors,
Photo Source: Eric Vance, EPA

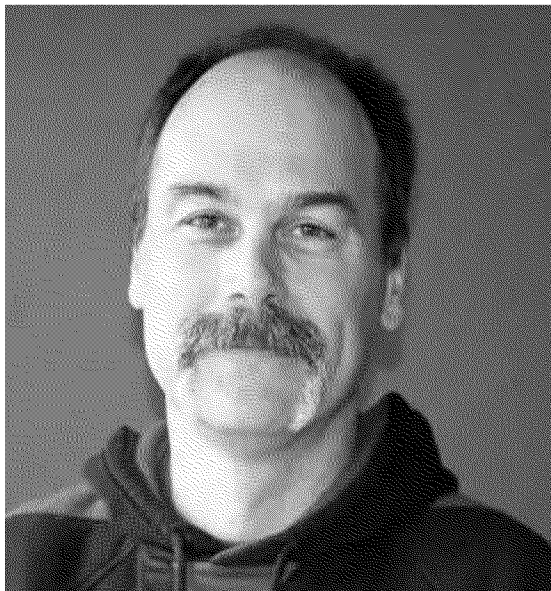
Therefore, there will be a pressing need to improve governmental communication and transfer of information among the EPA, state, tribal and local governments, and to get that information out to the public. Specific tailored information for local elected officials is also needed to convey the effective changes on any new WOTUS rule.

"A change in culture is necessary in managing our water resources. Working together to solve our problems is what is needed rather than imposing fines on cities who already cannot pay. "

*Mayor Elizabeth Kautz, Burnsville, Minnesota
and Vice-Chair of the Protecting America's
Waters Workgroup*



Mayor Elizabeth Kautz, Burnsville, MN



From the snow cap mountains to the ocean, water is - and always- will play a crucial role in tribal culture and life. Clean water sustains our food sources, especially salmon and shellfish. Chairman Shawn Yanity, Stillaguamish Tribe

Chairman Shawn Yanity, Stillaguamish Tribe

K. Financial Sustainability

One of the common themes heard by LGAC members revolves around affordability. This issue has several components including compliance, pollution and clean-up costs. Punitive costs only serve to reduce local government resources and increase the disproportionate costs for small and economically disadvantaged communities. If the goal is safe, clean water throughout the country, innovation in approach and cost allocation must be considered at the federal, state and local levels.



The availability and cleanliness of our water supply is paramount to building a great nation.

Mayor Sal Panto, Easton, PA

Mayor Sal Panto, Easton, PA



"Waters of the U.S. needs an education piece so that others are given a clear understanding that clean and safe water is a precious resource connected to everything-the water we drink and the food we eat. And we have a responsibility to protect it not only this generation but the generations to come." Samara Swanston
Counsel to the New York City Legislature

Samara Swanston, Counsel to the New York City Legislature

III. Response to Charge: Findings and Recommendations

- ☐ **Question: 1-** How would you like to see the concepts of 'relatively permanent' and 'continuous surface connection' be defined? How would you like to see the agencies interpret 'consistent with Scalia'? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?

1.a. How would you like to see the concepts of 'relatively permanent' and 'continuous surface connection' be defined?

Background

In the *Rapanos v. United States* 547. U.S. 715 (2006), the Supreme Court provided a plurality decision of four justices, led by Justice Scalia. The decision basically challenged federal jurisdiction to regulate isolated wetlands under the Clean Water Act. It also applied a very narrow interpretation to CWA jurisdiction, extending the agencies' regulatory authority only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. Justice Kennedy focused on whether the waters in question have a "significant nexus" to traditional navigable waters, *i.e.*, whether they, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" The LGAC has previously commented that they would prefer a clear and simple approach for jurisdictional determinations such as an approach that yields categorical answers of jurisdiction in these categories: 'yes', 'no' or 'maybe' responses. Any of these answers are sufficient for local governments if these answers are provided in a timely fashion.

Recommendations



EPA and the Corps should apply simple approaches that yield jurisdictional calls with simple criteria that give a 'yes', 'no' or 'maybe' answer. (2014 LGAC Report)



The LGAC recommends using State criteria for these terms as a potential Approach to Wetlands with a "Continuous Surface Connection" and "Relatively Permanent" Waters. Here are a few examples of such criteria:

Jurisdictional

- ✦ Streams with seasonal flows or streams with man-made flows from other water bodies should not cause ephemeral and intermittent streams to be defined as 'relatively permanent'. Metrics and thresholds should be established when a stream is considered "relatively permanent." Such metrics will vary geographically, and the thresholds will be subjective, and made on a case-by-case basis.
- ✦ Perennial streams only as "relatively permanent waters".
- ✦ Wetlands that directly touch jurisdictional waters are jurisdictional.
- ✦ Wetlands with permanent, continuously flowing, surface connections should be included as jurisdictional.

Non Jurisdictional

- ✦ Erosional features in the arid West, such as arroyos and dry washes should be 'non-jurisdictional'. However, there may also be circumstances where the current practice of considering wetlands with a continuous surface connection, regardless of distance, to be jurisdictional is not appropriate. Such connections should be perennial (and not include ephemeral and intermittent connections).
- ✦ Ditches and canals that only carry intermittent flows of water and that are not a relocated tributary or excavated in a tributary, as well as stormwater control features that periodically flow in response to significant precipitation events, should also be exempted.
- ✦ Develop metrics to identify when "some degree of connectivity" should not be utilized. This will require subjectively defining thresholds for what constitutes a significant degree of connectivity, which should be avoided if at all possible.
- ✦ Wetlands where connections do not exist should be exempted from jurisdiction.
- ✦ Overland flows that flow through dryland breaks to a WOTUS (rendering a tributary up gradient of the dryland break) should be non-jurisdictional.

- Water features that may be present (for example, residual ponds resulting from placer or other mining efforts) are not jurisdictional where a continuous physical channel is absent; a bed-and-bank is not discernible; an ordinary high water mark is not observable; and/or there are no flow characteristics are not jurisdictional.

1.b. How would you like to see the agencies interpret 'consistent with Scalia'?

Background

EPA and the Corps issued the 2008 guidance document following the *Rapanos* case that was intended to clarify WOTUS. It does so by asserting CWA jurisdiction over waters that would meet *either* the plurality test (relatively permanent; continuous surface connection) *or* the significant nexus test. In the Guidance and Memorandum of Agreement between the Corps and EPA, there is a list of key questions and answers, that generally breaks the jurisdictional analysis into three major categories. *NOTE: The 2008 guidance did not go out sufficiently for public review and was not communicated well to local governments and other stakeholders.* The first, and presumably more manageable category includes those waters over which CWA jurisdiction will be asserted in every case. And then the second category of waters that are not Waters of the U.S. The third category of 'maybe' will go to criteria developed by the states on waters that are significant and should be included as jurisdictional waters.

Recommendations:

- Criteria as outlined in the 2008 guidance should be used for a revised rule, along with revised definitions and the use of state-specific criteria.
- Definitions should be modified to provide clarity.
- Criteria should be developed that state a series of questions to determine 'relatively permanent' or 'continuous'. If answers are 'yes' or 'no' it leads to a 'yes', 'no' or 'maybe' jurisdictional determination. If there is a 'maybe', it diverts to state-specific criteria for jurisdictional determination.

1.c. Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?

- EPA and the Corps should establish an Interagency Taskforce to develop the matrix of questions to determine 'permanent' and 'continuous' indicators. Their results should be published and the public given the opportunity to give comment. (LGAC 2014 Report)



The LGAC recommends these following examples of state- specific criteria for the revised rule:

Intermittent streams, playa lakes, wetlands, and other waters:

- ✦ In cooperation with the states, the EPA should designate intermittent streams and other waters as non-waters of the U.S. based on the following criteria:
 - ☐ Seasonal flow of running or standing water — each state to develop its own criteria subject to EPA review and approval;
- ✦ Because of the variability of conditions within and among states, the EPA should provide guidelines for state standards that include factors to be considered, but which do not necessarily constitute federal standards (such as the Science Advisory Board's Connectivity Report).⁶
- ✦ Such factors to include are:
 - ☐ Average number of days of stream flow;
 - ☐ Seasonality of stream flow;
 - ☐ Rate of stream flow;
 - ☐ TMDL levels during such periods, amount of water and TMDLs delivered to the "discharge" body of water; and
 - ☐ Any other relevant factors as the Agency deems appropriate.
- ✦ States should have standards/factors which reflect possible ground water recharge rates on intermittent streams, playa lakes, wetlands, and other waters. Similarly, factors should include potential contamination of ground water from such water bodies.
- ✦ States should develop metrics for each standard they propose and submit to the EPA for review and approval. EPA should respond within 90 days from receipt of a completed state plan to review, propose revisions, or deny the submitted standards and metrics. Failure to complete the analysis within 90 days, subject to the EPA and state agreeing on a time extension, shall result in the submitted standards and metrics being deemed accepted.
- ✦ Once the state-submitted standards (three years) are accepted, each state should submit a report to the EPA detailing whether the waters in question continue to meet the EPA -accepted standards, as determined by the state's metrics. The EPA should determine whether each state should submit subsequent reports on an annual or other timeline basis.
- ✦ States should use generally accepted scientific findings on issues that affect water quality related to intermittent streams, playa lakes, wetlands, or other designated waters. The EPA may request states review their standards and submit proposed revised plans for the Agency's consideration and approval.

⁶ U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft). U.S. Environmental Protection Agency, Washington, DC, EPA/600/R-11/098B, 2013.

Permanent Bodies of Water:

- ✦ Many wetlands are seasonal and have been addressed above. For those wetlands that are permanent, states should be empowered to develop metrics that demonstrate whether the water draining a wetland connected to jurisdictional water are "cleaner" than the water that otherwise would flow, if the wetlands were not present.
- ✦ States should submit proposed criteria and measurement techniques to the EPA for review and approval. EPA should have 90 days from receipt of completed state plan to review, suggest revisions, and approve or deny the submitted plan. If the review is not completed within 90 days, subject to extension if the EPA and state agree, the submitted plan shall be deemed accepted.
- ✦ States should be encouraged to develop water quality criteria and standards for wetlands and other water bodies that impact ground and source water quality.

■ An application for Smart phone or hand-held computer should be developed to give a quick jurisdictional determination and the output sent to all interested parties. (LGAC 2014 Report)

■ Manmade conveyances, stormwater treatment systems, ditches, farm and irrigation ditches and green infrastructure amenities should be exempt from jurisdiction. Where possible, EPA and the Corps should work with State, local and tribal governments to map these features as well. *NOTE: Drinking water and wastewater treatment utilities may have these features mapped as part of Asset Management features* (LGAC 2014 Report)

- **Question 2-** What opportunities and challenges exist for your locality with relying on Justice Scalia's opinion?

Background

Cities and communities care deeply about the quality of water. One concern is that a rule that is left entirely to interpretation and does not provide sufficient clarity, may add to costs and delays without causing important improvement to water quality. (Iowa NLC Letter) We understand that the goal is to make it easier to identify WOTUS and a rule interpreting the Scalia decision may not draw bright enough lines for local governments to easily identify those waters affected. Therefore, the use of the Scalia approach in and of itself is unlikely to significantly resolve all of the considerable uncertainty surrounding CWA jurisdiction (either then or now), or prevent continuing litigation to test the agencies' interpretations in the federal courts. However, the 2008 guidance does have criteria that will pose less uncertainty and yield faster results. If the 2008 guidance were revised to include clearer definitions with input from states, local and tribal governments and other stakeholders, with state-specific criteria, it could perhaps help to resolve these issues.

Recommendations:

■ Relying on a modified Scalia approach and incorporating the 2008 guidance into a revised rule can provide a clearer certainty of federal jurisdictional waters which will lead to more certainty and more ease in permitting.